Rights under International Humanitarian Law

Article

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1 Introduction

The different ways in which the concept of 'rights' is invoked under international humanitarian law (IHL) has received little detailed attention.[1] Historically, the term 'rights' was invoked to refer to belligerent or State rights under the law of war to engage in actions in wartime that would not otherwise be permitted under the law of peace. Under just war doctrine, for example, 'rights' often referred to the right of the just side to do what was necessary for the cause, and as just war gave way to alternative theories in the seventeenth and eighteenth centuries, scholars such as Grotius, Vattel and Pufendorf wrote of belligerent rights to kill, capture and destroy.[2] The late nineteenth and early twentieth century canonical texts similarly invoked the concept of 'rights' under the law of war in this way.[3]

This is to be contrasted with the notion of rights of *individuals* in wartime, whereby IHL is considered to vest primary substantive rights in individuals (e.g. of civilians not to be targeted and prisoners of war to be treated humanely) and/or a secondary right to reparations in the event of a violation of the substantive rules. Such a notion of individual rights was entirely absent from those traditional accounts of the law, with individual victims of armed conflict being seen not as rights-holders but incidental beneficiaries of an inter-State system of rights and obligations; the legal right to see a belligerent State honour its obligations under the law of war was thus considered to vest in the enemy State alone (or the enemy belligerent in a civil war where belligerency was recognised).[4] This view most clearly manifested with respect to the settlement of war reparations, for which an inter-State agreement was often made that included a lump sum settlement and waiver of individual claims.[5] Such waivers were possible on the assumption that only inter-State rights and obligations, not individual rights, were implicated in war, an assumption consistent with international law more generally at the time.[6]

Certain commentators continue to take the view that contemporary IHL does not grant rights directly to individuals. René Provost, for example, has argued that 'humanitarian law protects the

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[1] An examination of *both* State *and* individual rights under IHL, which is the focus of this article, has not, to my knowledge, been carried out in any detail elsewhere. A few have given a more than cursory treatment of individual rights under IHL: R. Provost, *International Human Rights and Humanitarian Law* (2002) 26-42; K. Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (2013) 176-228 (part of a broader discussion of the status of individuals in IHL); A. Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (2016) 194-216. Others have considered the specific question of the individual right to reparations: e.g. Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85 *International Review of the Red Cross (IRRC)* 497; Bank and Schwager, 'Is There a Substantive Right to Compensation for Individual Victims of Armed Conflict Against a State Under International Law?' (2006) 49 *German Yearbook of International Law* 367; Tomuschat, 'Reparations for Victims of Grave Human Rights Violations' (2002) 10 *Tulane Journal of International & Comparative Law* 157.

[2] S.C. Neff, *War and the Law of Nations: A General History* (2005) 62-5 (on rights of war under just war theory) and 147-51 (on rights of war under later theories).

[3] See, e.g., L. Oppenheim, *International Law, A Treatise: Volume II, War and Neutrality* (1906) 333-4; T.J. Lawrence, *The Principles of International Law* (1895) 108 and 306.

[4] Aldrich, 'Individuals as Subjects of International Humanitarian Law' in J. Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996) 851; Provost, *supra* note X at 27.

[5] See, e.g., 1951 San Francisco Treaty of Peace with Japan, UKTS No 33 (1952), arts 14 and 19.

[6] McNair, 'The Effect of Peace Treaties upon Private Rights' (1939-1941) 7 *Cambridge Law Journal* 379.

interests of the individual through means other than the granting of rights'.[7] This orthodoxy is not, however, shared by all writers, with some taking the position that IHL has evolved so as to grant rights to individual victims (in addition to their national States) corresponding to an enemy State's obligations. George Aldrich, Yoram Dinstein, Christopher Greenwood and Theodor Meron, for example, have all opined that contemporary humanitarian law grants (certain) rights directly to individuals.[8]

This disagreement over the nature of rights under IHL arose in the *Jurisdictional Immunities* case before the International Court of Justice (ICJ), in which the Court assessed the conformity with international law of Italian court judgments granting compensation to individual victims against Germany for abuses during the Second World War.[9] The majority judgment held that it unnecessary to address the question of whether individuals are granted rights under IHL for which they are entitled to compensation in the event of breach, as it decided the case on the basis of State immunity.[10] For the Court, the nature of State immunity meant Italy's responsibility could be determined without considering many of the arguments on the merits, including the question of rights under IHL.

Such questions were, however, considered both in the pleadings and in some of the separate and dissenting opinions of judges on the Court, given their potential importance had the Court not resolved the dispute on the basis of State immunity. It is here that we find significant disagreement over the nature of rights under IHL. Italy and, as intervenor, Greece, were firmly of the view that IHL grants both primary substantive rights and secondary rights of compensation for violations directly to individuals.[11] In their dissenting opinions, Judges Yusuf and Cançado Trindade also took the view that IHL grants the right to reparations for breaches directly to individual victims.[12] This was seen, in part, as reflecting a clear evolution in the law that was influenced by the the growing prominence of international human rights law (IHRL).[13]

Making the contrary argument, and supporting the more traditional position noted above, Germany made clear its view that 'no individual entitlements [arise] from the breaches of IHL perpetrated by Germany'.[14] Judges Koroma and Keith in their separate opinions agreed.[15]

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[7] Provost, *supra* note 1 at 16. Similarly, see Vöneky, 'Implementation and Enforcement of International Humanitarian Law' in D. Fleck (ed), *Handbook of International Humanitarian Law* (2013) 684 (thought without elaborating); Parlett, *supra* note 1 at 224.

[8] None of these elaborates in much detail on this point, however: Meron, 'The Humanization of Humanitarian Law' (2000) 99 *AJIL* 239; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2016) 28-9; Greenwood, 'Rights at the Frontier – Protecting the Individual in Time of War' in B. Rider (ed), *Law at the Centre – The Institute of Advanced Legal Studies at Fifty* (1999) 281-3; Aldrich, *supra* note 4.

[9] *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Merits Judgment) [2012] ICJ Rep 99.

[10] *Jurisdictional Immunities, supra* note 9 at [108] ('the Court need not rule on whether … international law confers upon the individual victim of a violation of the law of armed conflict a directly enforceable right to claim compensation').

[11] *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, Written Pleadings of Greece, 3 August 2011, [34]-[39]; *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, Counter-Memorial of Italy, 22 December 2009, [5.23].

[12] *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* [2012] ICJ Rep 99 (Dissenting Opinion of Judge Yusuf) [12]-[19]; *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* [2012] ICJ Rep 99 (Dissenting Opinion of Judge Cançado Trindade) [70].

[13] *Jurisdictional Immunities* (Greece), *supra* note 11, [31]-[33]; *Jurisdictional Immunities* (Judge Cancado Trindade), *supra* note 12, [70].

[14] *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, Reply of Germany, 5 October 2010, [45] and [39]-[49].

Indeed, in making this argument, Germany, as well as Judges Koroma and Keith, all relied on strong historical claims. Judge Keith, for example, argued that the idea of individual claims for war damages has never been accepted by States, pointing to the long-standing practice of determining war reparations at the inter-State level and the impracticability of granting full compensation to each individual victim at the end of an armed conflict.[16]

It is on this question of the nature of rights under IHL, in the sense of individual and State rights, that this article focuses. In so doing, it has two aims, both of which advance the existing literature in this area. First, it will explore the extent to which treaty law and State practice support the claim that IHL grants rights directly to individuals. This will form the majority of the article due to the broad material to cover. The principal goal here is not to establish conclusively whether the positive law grants such individual rights, though some tentative thoughts will be offered on this point, but rather to consider how the idea of individual rights has developed over IHL's recent history and whether the various claims noted above in the *Jurisdictional Immunities* case are supported by this history. Whilst the majority of scholarship touching on the question of individual rights under IHL focuses on the specific right to reparations,[17] this article is concerned with individual rights more generally, including primary, substantive rights to be treated in particular ways. Though practice in relation to the right to reparations will be discussed in some detail, by also looking at other provisions of IHL, this article offers a more comprehensive consideration of the individual rights debate. It will also consider what is at stake in this debate, which has not been addressed in detail elsewhere.

Second, the article will go on to compare this debate with the recent re-emergence of the notion of belligerent or State rights, in which States rely on IHL to empower them to exercise coercive measures. The juxtaposition of these two senses of 'rights' under IHL has not been explored elsewhere in the literature. It will be argued that these two different notions of 'rights' go to the heart of IHL's object and purpose, pointing to two fundamentally different visions for the law's role in contemporary armed conflict.

Each of these issues will be explored in turn. To begin, section 2 will consider what is at stake in the debate over individual rights under IHL, with section 3 moving on to an examination of the treaty rules and practice in relation to the question of whether IHL grants rights directly to individuals. Section 4 will then compare this debate to other recent arguments in which the idea of State or belligerent rights under IHL has re-emerged.

2 What is at stake in the debate on individual rights under IHL?

Faced with the disagreements outlined above over the extent to which IHL grants rights direcly to individuals, one must ask what are the consequences of this debate. This section will advance three key consequences of this disagreement over individual rights. The first two outlined below

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[15] *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* [2012] ICJ Rep 99 (Separate Opinion of Judge Koroma) [9]; *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* [2012] ICJ Rep 99 (Separate Opinion of Judge Keith) [18]-[19].

[16] *Jurisdictional Immunities* (Judge Keith), *supra* note 15 at [18]-[19]. Similarly see *Jurisdictional Immunities* (Judge Koroma), *supra* note 15 at [9] ('a provision requiring state payments to individuals would have been inconceivable in 1907, when the Hague Convention IV was concluded, as international law at that time did not recognize the rights of individuals to the extent that it does today'); *Jurisdictional Immunities* (Reply of Germany), *supra* note 14 at [39] ('the relevant instruments do not provide for individual entitlements. This was the *communis opinio* in 1907').

[17] See *supra* note 1.

concern some of the core doctrinal consequences of the debate, in particular its implications for the relationship between IHL and international human rights law (IHRL) and for the practice of negotiating war reparations. The third consequence discussed is more fundamental and concerns IHL's overall purpose.

The first consequence of the debate over individual rights under IHL concerns the question of the relationship between IHL and IHRL and may be summarised briefly.[18] It has been suggested that one significant difference between these two bodies of law is that, whilst human rights treaties confer direct rights on individuals, IHL treaties are drafted in terms of obligations (with any correlative rights being those of the enemy State), benefiting individuals only indirectly.[19] Some have gone further,[20] implying that this distinction makes more difficult to accept those approaches in which these two bodies of law are read in light of one another.[21] Without passing judgment on these arguments, it is clear that the debate over individual rights under IHL could have consequences for how we think about differences and similarities between these two bodies of law.

A second consequence of this debate relates to the impact that the nature of rights under IHL may have on the invocation of State responsibility for violations. As explored below, one of the specific rights that is sometimes said to vest directly in individuals under IHL is the right to invoke State responsibility and, more specifically, to reparations for violations of IHL's substantive rules (such as the prohibition of targeting civilians). Indeed, it has been suggested more generally that, should the primary, substantive rules of IHL be considered to grant individuals direct rights, any violation thereof automatically carries with it not only obligations of cessation and reparations for the violating State,[22] but also correlative rights of the individual victims to cessation and reparations under the secondary rules on State responsibility.[23] There is some implicit support for this in recent inter-State human rights cases, in which it is argued that any compensation paid is due to the individual victim, in contrast to the traditional approach to diplomatic protection.[24]

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[18] On this, see Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' in M. Andenas and E. Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (2015).

[19] Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 *IRRC* 501, 503; Provost, *supra* note 1 at 16; Doswald-Beck and Vité, 'International Humanitarian Law and Human Rights Law' (1993) 33 *IRRC* 94, 101.

[20] Hansen, 'Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict' (2007) 194 *Military Law Review* 1; Modirzadeh, 'The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict' (2010) 86 *International Law Studies* 349, 357 (invoking this distinction and then going on to critique the co-applicability of IHL and IHRL).

[21] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion [1996] ICJ Rep 226 [25]; *Hassan v United Kingdom*, App No 29750/09, Judgment (Grand Chamber), 7 July 2011.

[22] International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts [2001] *Ybk of the ILC*, Vol. II (Part Two), Commentary to art 31, [4] ('the general obligation of reparation arises automatically upon commission of an internationally wrongful act'); *Factory at Chorzow (Germany v Poland)* (Merits) [1928] PCIJ Series A No 17, 29 (stating its principle on reparations in clearly general terms, without limiting itself to obligations owed to States).

[23] Supporting such a view, see Peters, *supra* note 1 at 167-93; Schwager, 'Reparation for Individual Victims of Armed Conflict' in R. Kolb and G. Gaggioli, *Research Handbook on Human Rights and Humanitarian Law* (2013) 634-7; ILC, Articles on State Responsibility, *supra* note 22 at Commentary to art 33, [3]. Though cf Tomuschat, 'Individual Reparation Claims in Instances of Grave Human Rights Violations' in A. Randelzhofer and C. Tomuschat (eds), *State Responsibility and the Individual* (1999) 13; *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, Written Observations of Germany on the Written Statement of Greece, 26 August 2011, [11].

[24] *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Compensation, Judgment [2012] ICJ Rep 324, Separate Opinion of Judge Cançado Trindade, [5]; ibid, Separate Opinion of Judge Greenwood,

In viewing individual victims as holders of secondary rights, including to reparations, the individual rights perspective could have important implications for the permissibility of inter-State agreements on war reparations that purport to waive individual claims. To demonstrate this, it is useful to look to other areas of international law in which similar debates exist. For our purposes, a useful analogue is the international law of investment protection and the question of the nature of rights under bilateral investment treaties (BITs), i.e. whether BITs create rights only for the States parties or whether they *also* grant rights directly to investors.[25] It has been argued in this context that whether one characterises the (substantive or procedural) rights under BITs merely as State rights or (also) as direct rights of investors might affect the permissibility of waivers by the investor's national State of the right to invoke the responsibility of the wrongdoing State.[26] Simply put, a State can only waive its own rights, and if investors are considered holders of direct rights under BITs, then, according to this argument, national States would not have complete freedom to waive investors' rights.[27]

If one applies the same argument by analogy here, then, in the event that IHL treaties are considered to grant rights directly to individuals, States party to an international armed conflict would potentially face difficulties in post-conflict mass settlements of claims for violations of IHL. This is because the State, though capable of waiving its own right to invoke the violating State's responsibility, may not be capable of doing the same with respect to its nationals' rights.[28] Of course, individuals would be free to waive their own rights as part of a lump sum settlement.[29] As noted, inter-State settlement of war reparations was, historically, a common feature of peace treaties, with States considered free to waive any claims by their nationals in such circumstances.[30] If IHL is considered still to create rights only for States, and not also for individual war victims, this traditional model could be preserved.[31] If, however, IHL confers rights directly on individuals, then, according to this argument, their consent may be needed to expunge their claims, including as part of mass settlements.

This issue was raised in a number of the submissions and judgments in the *Jurisdictional Immunities* case. Italy, for example, argued that States are not free simply to waive the individual right to reparations for serious violations of IHL.[32] In his dissenting opinion, Judge Cançado Trindade

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[1]; *Cyprus v Turkey*, App No 25781/94, Judgment (Just Satisfaction), 12 May 2014, [46]. In a different context, see ECJ, *Francovich* et al *v Italy* [1991] ECR I-05357, C-6/90 and C-9/90, [31]-[37].

[25] There are a variety of potential approaches to the nature of investors' rights: see, e.g., Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 *British Yearbook of International Law (BYIL)* 151 (presenting the three principal approaches of derivative rights, direct procedural rights, and direct procedural *and* substantive rights); Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' (2013) 24 *EJIL* 617 (presenting the alternatives in terms of agency rights, direct rights, and third party rights); Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights' (2015) 56 *Harvard International Law Journal* 353 (arguing against the allegedly binary approach of State versus individual rights, and instead proposing a model that recognizes investors as third party beneficiaries with limited rights).

[26] Douglas, *supra* note 25 at 169-70; Paparinskis, *supra* note 25 at 645; J.-E. Alvarez, *The Public International Law Regime Governing International Investment* (2011) 418. Cf Roberts, *supra* note 25 (arguing for a limited conception of direct rights under BITs that does not prevent the home State waiving their investors' rights).

[27] Ibid.

[28] Taking this view, see Dinstein, *supra* note 8 at 29; Peters, *supra* note 1 at 214.

[29] Parlett, *supra* note 1 at 100 ('[o]ne would expect that where a tribunal was determining claims which belonged to individuals, settlement of those claims … would … be conditional upon their consent').

[30] See above at text to notes 5-6.

[31] See Palchetti, 'Can State Action on Behalf of Victims be an Alternative to Individual Access to Justice in Case of Grave Breaches of Human Rights?' (2014) 24 *Italian Yearbook of International Law* 53 (calling for greater use of inter-State settlement of mass human rights and humanitarian law claims, notably where domestic courts do not have jurisdiction due to State immunity rules).

[32] *Jurisdictional Immunities* (Italy), *supra* note 11 at [5.52].

was explicit in his view that 'a State can waive only claims on its own behalf, but not claims on behalf of human beings pertaining to their own rights, as victims of grave violations of international law.'[33] Germany, by contrast, relied on the practice of States in concluding inter-State settlements for war reparations with waivers of individual claims to support its view that IHL does not grant rights to individuals, including the right to reparations.[34] Though these arguments were expressed in binary terms as either an individual right to full reparations or the State's right to waive individual claims entirely, it is conceptually possible for individuals to possess a limited right to reparations that does not prevent final inter-State settlement and partial compensation but does prevent absolute State waiver where no alternative compensation mechanism is provided.[35] Italy, for example, took a similar view to this in its submissions.[36] This could nonetheless still have significant consequences for the freedom of States here.

The above two consequences of the debate over individual rights under IHL are fairly doctrinal. The final consequence to which I wish to draw attention is more fundamental and relates to what this debate says about the object and purpose of IHL and the role that we want law to serve in armed conflict. It is clear that those invoking the individual rights perspective see this as intimately linked with IHL's *raison d'etre*. In *Jurisdictional Immunities*, Greece, for example, stated that

> … it cannot be argued with any seriousness that IHL – law *par excellence* aimed at protecting the individual and his rights – does not confer direct rights on individuals which are opposable to States. That notion is implicitly accepted in a series of IHL provisions and explicitly accepted in the philosophy and very raison d'etre.[37]

Italy similarly argued:

> IHL does not pose rights and obligations in the interests of the Contracting Parties, but to protect persons; thus it logically follows that it cannot allow the Contracting Parties to … waive such protection altogether. This is more than a fundamental principle of IHL, it is its very raison d'etre.[38]

Underpinning Italy and Greece's submissions was thus a particular view of IHL's purpose, that is, the protection and empowerment of individual victims. Indeed, Greece in its written pleadings and Judge Cançado Trindade in his dissenting opinion considered the evolution of an individual right to reparations under IHL as reflective of the progression of international law towards greater recognition of individuals.[39] In this respect, the individual rights perspective fits well with those narratives of progress and humanisation often invoked both in IHL[40] and in international

[33] *Jurisdictional Immunities* (Judge Cancado Trindade), *supra* note 12 at [71].
[34] *Jurisdictional Immunities* (Germany), *supra* note 14 at [45]-[46]. Similarly, see *Jurisdictional Immunities* (Judge Keith), *supra* note 15 at [18]-[19].
[35] Such an interpretation has been proposed by some: see, e.g., Peters, *supra* note 1 at 215-16 (in the context of IHL); Roberts, *supra* note 25 (in the context of international investment law).
[36] *Jurisdictional Immunities* (Italy), *supra* note 11 at [5.14].
[37] *Jurisdictional Immunities* (Greece), *supra* note 11 at [35].
[38] *Jurisdictional Immunities* (Italy), *supra* note 11 at [5.21].
[39] *Jurisdictional Immunities* (Greece), *supra* note 11 at [31]-[33]; *Jurisdictional Immunities* (Judge Cançado Trindade), *supra* note 13 at [70].
[40] See e.g. Meron, *supra* note 1; Neff, *supra* note 2 at 340; Y; Mégret, 'Theorizing the Laws of War' in A. Orford and F. Hoffmann (eds), *The Oxford Handbook to the Theory of International Law* (2016) 775.

law more generally.[41] Recognising individual rights under IHL can be seen as part of this trend and the growing pressure for, inter alia, IHL to reflect a more individual rights-based morality.[42] Certain scholars have even called for a rewriting of IHL in order to reflect a pure moral standard based on the preservation of individual rights.[43] An IHL that grants rights to individuals and empowers them to invoke the responsibility of wrongdoing States helps to meet this pressure for a more morally-informed and individually-focused law of war.

We will return to this theme of IHL's purpose in section 4 when discussing the re-emergence of State rights. It will be shown there that this alternative notion of rights presents a very different vision for the law's role in armed conflict. Before that, however, section 3 will now consider the extent to which the individual rights perspective of IHL enjoys support in treaty law and practice.

3 Individual rights in treaty law and practice

It was explained in the introduction that traditional accounts did not recognise rights of individual victims under the law of war, but only rights of their national State, in line with the orthodox position in international law until the latter part of the twentieth century.[44] As noted, Germany, as well as Judges Keith and Koroma, relied on strong historical claims in concluding that IHL does not provide an individual right to reparations.[45] This section considers whether treaty law and practice support these accounts of IHL's history. In fact, it will be shown that the *travaux* of early IHL treaties reveals acceptance amongst the drafters of the individual rights perspective, with later treaties consolidating this (3.1). However, subsequent State practice in relation to war reparations during much of the twentieth century overtook this and reverted to the traditional, inter-State position (3.2). Finally, practice in more recent years has seen a revival of the individual rights perspective (3.3).

3.1 The treaties and *travaux*: early support for the individual rights perspective

As the Permanent Court of International Justice (PCIJ) in the *Jurisdiction of the Courts of Danzig* case made clear, any treaty provision (or customary rule) may, if intended, confer rights directly on individuals.[46] The ICJ in *LaGrand* held that whether a treaty provision grants rights directly to

[41] See, e.g., Peters, *supra* note 1 at 1-3; T. Meron, *The Humanization of International Law* (2006); Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32 *American University Law Review* 1.

[42] Dill, 'The Twenty-First Century Belligerent's Trilemma' (2015) 26 *EJIL* 83, 98-100 (noting the growth over the twentieth century of an international public opinion favouring an individual rights-based morality as informing international relations).

[43] See, e.g., J. McMahan, *Killing in War* (2011). Cf. Dill, 'Should International Law Ensure the Moral Acceptability of War?' (2013) 26 *Leiden Journal of International Law* 253. More moderate proposals seek to bring IHL closer to an individual rights-based morality by, for example, further limiting the class of targetable persons: see, e.g., Beer, 'Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity' (2015) 26 *EJIL* 801.

[44] See *supra* at text to notes 4-6; Parlett, *supra* note 1 at 181.

[45] See *supra* at text to note 16.

[46] *Jurisdiction of the Courts of Danzig* (1928) PCIJ Series B, No 15, 17-18 ('it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations').

individuals is a matter of treaty interpretation.[47] In elaborating, the Court emphasised the importance of the treaty text itself (whether the language of 'rights' is used) and the role of the individual under the provision (whether its operation is conditional upon actions by the individual).[48] Though it as been suggested that the ICJ, by focusing on the text, departed from the PCIJ's focus on party intentions,[49] the better view is that one must examine the treaty text, in addition to other factors, in order to help distil party intentions.[50] Indeed, it is clear that the use of the term 'rights' is not a necessary condition for the creation of individual rights.[51] However, as the goal here is not to enumerate a full list of IHL provisions granting individual rights, but rather to test the acceptance of such rights in principle, the focus will principally be on those provisions either explicitly referring to individual 'rights' or whose *travaux* supports such a reading, as these arguably provide the strongest indication of the original intentions of the parties.

Applying the *LaGrand* framework, the earliest treaties on the law of armed conflict rarely made reference to 'rights' of individual victims (as opposed to belligerents) in their provisions, instead speaking in terms of 'obligations'; indeed, this is true not only for so-called Hague law but also Geneva law, which is sometimes seen as speaking more directly to individuals.[52] Nevertheless, there were exceptions, in which certain provisions in the early treaties did refer to 'rights' of individual war victims.[53] What is perhaps more striking is the *travaux* of Article 3 of the 1907 Hague Convention IV (on compensation for violations of the Hague Regulations) that strongly suggested a general acceptance amongst the delegates that the draft article endowed the individual victims of violations with the right to compensation (rather than the victim's national State).[54] The UK delegate, for example, stated that 'I do not deny the obligation which exists on the part of a belligerent Power to indemnify those who have been victims of violations of the laws and customs of war'.[55] At a time where it was assumed that individual rights were not

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[47] *LaGrand (Germany v United States of America)* [2001] ICJ Rep 466, [77]. See also ECJ, Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratis der Belastingen* [1963] ECR 1.

[48] *LaGrand*, *supra* note 47 at [77]; Paparinskis, *supra* note 25 at 626.

[49] Parlett, *supra* note 1 at 96.

[50] See also *Corn Products International, Inc v United Mexican States*, ICSID Case No ARB(AF) 04 01, Decision on Responsibility, 15 January 2008, [168] ('[i]n the case of rights said to be derived from a treaty the question will be whether the text of the treaty reveals an intention to confer rights not only upon the Parties thereto but also upon individuals and/or corporations').

[51] Greenwood, *supra* note 8 at 282; *van Gend en Loos, supra* note 47.

[52] See, e.g., Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864 (e.g. art 6 stating that '[w]ounded or sick combatants, to whatever nation they may belong, shall be collected and cared for'); Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, art 1 ('[t]he laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps').

[53] See, e.g., Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, art 3 (right of enemy armed forces to be treated as POWs) and art 46 (respect for family rights); Institute of International Law, *Manual of the Laws of Naval War* (1913) art 114 (right to indemnity for owner of destroyed goods that are not subject to capture); Convention Relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, arts 42, 62 and 64 (certain rights of POWs in relation to their treatment and any penal proceedings against them).

[54] Art 3 itself does not explicitly refer to such a right: 'A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation.'

[55] J.B. Scott, *The Proceedings of the Hague Peace Conferences: The Conference of 1907, Volume III* (1921) 142. Similarly, see ibid, 141 (responding to the original German proposal that expressly granted a right to compensation to neutral persons, whilst not granting such a right to enemy nationals, Louis Renault (the French delegate) stated: '…in many cases the violation of international regulations results in serious harm to individuals who should be indemnified' and argued that enemy nationals should be treated the same as neutrals); ibid, 142 (the UK delegate supporting Renault); ibid, 142 (the Swiss delegate stating his view that the original German proposal rightly confirmed that nationals of both neutral and enemy States have a right to compensation); J.B. Scott, *The Proceedings of the Hague Peace Conferences:*

generally conferred by treaties,[56] this early example stands out as an important counter to those historical claims in the *Jurisdictional Immunities* case outlined above.

In contemporary IHL treaties, notably the 1949 Geneva Conventions and their 1977 Additional Protocols, one can see a marked increase in the language of 'rights' of individual victims.[57] Two sets of common articles in the Geneva Conventions are frequently invoked as evidence of the existence of individual rights under IHL.[58] Common articles 6/6/6/7 prescribe that '[n]o special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them.' Common articles 7/7/7/8 set out the absolute rule that '[p]rotected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention.' Based on the *LaGrand* approach, these different provisions in the contemporary treaties, in using the language of 'rights' of protected persons, support the view that the drafters intended the Conventions to grant rights directly to individuals.[59]

Contrarily, it has been suggested that these provisions, though referring to 'rights', were not intended to establish international law rights, but rather either to create standards of treatment binding on the States parties (without a correlative right of individuals),[60] or to require of States that they confer such rights on individuals via their domestic law.[61] Some support for such views is found in the proceedings leading up to the 1949 diplomatic conference. Thus, during the 1947 meeting of government experts, a clear position was taken by some that the intended Conventions were not meant to create direct rights for individuals. When discussing a proposal for the provision prohibiting derogation from POW rights, the report of that meeting notes:

> Other delegations were emphatic in objecting that it seemed difficult, in an international convention, to stipulate rights which today are recognized to States alone; in their opinion the Convention was in fact not so much a declaration in principle as a series of bilateral agreements between belligerents who are signatories thereto.[62]

The Conference of 1907, Volume I (1920) 101-2 (assuming that the draft article conferred the right of compensation on nationals of neutral and belligerent States).

[56] See above at text to note 6.

[57] See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949 (GCIII), art 57 (right to communicate with prisoners' representatives); art 78 GCIII (right to complain to the detaining authority and protecting power regarding conditions of captivity); art 105 GCIII (rights of defence in penal hearings); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (GCIV), art 5 (permitting derogation from certain 'rights' under GCIV); art 38 GCIV (core rights of non-repatriated enemy aliens); art 48 GCIV (right of non-nationals of occupied State to leave occupied territory); art 72 GCIV (rights of defence of accused persons in occupied territory); art 76 GCIV (right of detainees to visits by ICRC); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, art 32 API (right of families to know fate of relatives); art 44 API (right to POW status); art 45(2) API (right to assert POW status before judicial tribunal); art 75(4)(a), (e), (g) and (i) API (rights of fair trial); art 79(2) API (right of accredited war correspondents to POW status).

[58] Dinstein, *supra* note 8 at 28; Zegveld, *supra* note 1 at 503; Greenwood, *supra* note 8 at 282; Aldrich, *supra* note 4 at 855; Peters, *supra* note 1 at 196-8.

[59] The ICRC Commentary views arts 6/6/6/7 and 7/7/7/8 as applying to all safeguards in the Conventions: see, e.g., ICRC, *Commentary on the First Geneva Convention* (2016), Commentary to art 6 at [980].

[60] Hampson, 'Human Rights Law and Humanitarian Law: Two Coins or Two Sides of the Same Coin? (1991) 1 *Bulletin of Human Rights* 46; Provost, *supra* note 1 at 29-30 (arguing that the drafters intended 'a protection regime setting up absolute standards of treatment', rather than direct rights for individuals).

[61] Parlett, *supra* note 1 at 187.

[62] ICRC, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims: Geneva, April 14– 26, 1947* (1947) 115.

The inclusion of a provision making clear that agreements between belligerents must not restrict the 'rights' of protected persons in the final version of the Conventions suggests that this view was rejected at the diplomatic conference. Moreover, support for the individual rights approach can be found in the *travaux* of the 1949 Geneva Conventions. Thus, an Italian proposal to the diplomatic conference that would have replaced the words 'rights which it confers upon them' in Articles 6/6/6/7 with 'rights which it stipulates on their behalf' was rejected, implying a general acceptance amongst the delegates that the Conventions do confer rights directly on individuals.[63] More generally, the 1949 delegates did not appear to avoid using language that one would expect to find in a diplomatic conference considering a human rights treaty.[64] Though necessarily not definitive, these references in the *travaux* point to an openness amongst the drafters to the individual rights perspective.

Where the nature of rights under the draft Additional Protocols was alluded to in the *travaux*, a similar level of support for the individual rights perspective can be found. Again, there were many references during the 1974-7 diplomatic conference by delegates to the 'rights' of individuals under the Protocols.[65] More clearly, the US delegate explicitly endorsed the individual rights perspective in response to Cuba's objection that draft Article 32 API placed too much emphasis on the right of families to information about war victims:

> If the right of families was not specifically mentioned, the section might be interpreted as referring to the right of Governments … The paragraph had been included in response to a strong feeling of many delegations and institutions that it was important to express in the Protocol the idea that families had a right to know what had happened to their relatives. United Nations General Assembly resolution 3220 (XXIX) … stated in the last preambular paragraph that "the desire to know is a basic human need", but the text under consideration went even further by referring to the "right".[66]

Less acknowledged than the use of the word 'rights' in the treaties is the existence of provisions that place obligations on the State at the instigation of individual protected persons. Article 78 GCIII, for example, asserts that POWs 'shall have the unrestricted right to apply to the representatives of the Protecting Powers … in order to draw their attention to any points on

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[63] ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949: Volume II, Section B* (1963) 76.

[64] See, e.g., ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949: Volume II, Section A* (1963) 822 (on draft art 30 GCIV requiring that protected persons have the facility to apply to the protecting power or ICRC, the Special Committee report on GCIV noted that '[i]t is not enough to grant rights to protected persons (Article 25) and to lay responsibility on the States (Article 26): protected persons must also be furnished with the support they require to obtain their rights; they would otherwise be helpless from a legal point of view in relation to the Power in whose hands they are'); ibid, 796 (on draft art 5 GCIV, Australia (proposer) said it was 'intended to strike a fair balance between the rights of the State and those of protected persons', and Bulgaria, objecting, said '[i]t would seem therefore that elementary human rights, rights which it was the purpose of the Convention to defend, would be seriously endangered'); *Final Record Vol II/B*, *supra* note 63 at 74 (in response to a UK proposal to amend draft arts 6/6/6/7 to permit special agreements that derogated from rights other than fundamental rights, the US delegate stated, 'it would be difficult to draw a distinction between rights which were fundamental and those which were not').

[65] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974–77): Volume VI* (Federal Political Department, Bern 1978) 60 (Australia); ibid, 236 (Romania); ibid, 248 (US); ibid, 264-5 (Austria and Belgium); *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974–77): Volume VIII* (Federal Political Department, Bern 1978) 223 (Italy); *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974–77): Volume V* (Federal Political Department, Bern 1978) 181 (New Zealand); ibid, 185 (Finland).

[66] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974–77): Volume XII* (Federal Political Department, Bern 1978) 232.

which they may have complaints to make regarding their conditions of captivity … [These requests] must be transmitted immediately.'[67] The inclusion of such obligations in a treaty provision was the second factor to which the ICJ pointed in *LaGrand* as evidence of an intention to create individual rights; by conferring powers on individuals that, when exercised, obligate the State to act (or prevent them from acting), these provisions again might imply a conferral of direct individual rights.

Importantly for our purposes, the above analysis suggests that what is sometimes presented as the orthodox legal position, i.e. that IHL was clearly not intended to confer rights on individuals,[68] is in fact a more contentious claim, with evidence from as early as the *travaux* to the 1907 Hague Convention IV providing support for the individual rights perspective at least with respect to certain provisions. The increase in the use of the term 'rights' from the 1949 Geneva Conventions onwards, as well as allusions to the concept of individual rights in their *travaux*, suggests that in fact there was some acceptance historically of this idea. The ICRC Commentary to the 1949 Geneva Conventions firmly embraced the notion that the Conventions confer rights directly on individuals, treating this as a development from the previous law.[69] Indeed, based on the *LaGrand* test, there is strong support that certain IHL provisions were intended to create primary, substantive rights for individuals.[70] Nonetheless, it will be shown in the next section that this early support for the individual rights perspective appeared to be overtaken by subsequent practice, itself a valuable guide to the intentions of States.[71]

3.2 State practice and a return to the traditional position

The principal difficulty with relying on State practice in this area is that, whether States consider particular provisions of IHL to create individual rights does not often emerge clearly from their practice. One area in which practice has been invoked in order to distil a sense of States' views on this relates to Article 118 GCIII on the repatration of prisoners of war. Here, it has been argued that, though Article 118 was originally conceived as a right of the national State to have its POWs repatriated, practice has since turned this into a right of POWs to be repatriated if they wish.[72] Beyond this one example, however, the other area in which one might discern the intentions of States regarding the individual rights perspective concerns the invocation of State responsibility for violations of IHL and, more specifically, the extent to which individual victims have a right to reparations against violating States. It is thus on practice in this area that this and

[67] Similarly see art 35 GCIV (entitlement of enemy aliens to demand appeal of refusal to leave enemy territory and to reasons for refusal); art 43 GCIV (entitlement of protected persons to demand review of internment and to prevent the detaining power from transferring their details to the protecting power); art 72 GCIV (accused persons can waive access to an interpreter, or to object to an interpreter and ask for a replacement).

[68] See above at text to note 16.

[69] JS Pictet (ed), *Commentary to Geneva Convention III Relative to the Treatment of Prisoners of War* (1960) 90 ('[i]t was not, however, until the Conventions of 1949 (in particular in Articles 6 and 7) that the existence of 'rights' conferred on prisoners of war was affirmed. In this connection, we would refer to the unanimous recommendation of the Red Cross Societies, meeting in conference in Geneva in 1946, to confer upon the rights recognized by the Conventions 'a personal and intangible character' allowing the beneficiaries 'to claim them irrespective of the attitude adopted by their home country').

[70] Some have gone further, relying on more general language (rather than 'rights' specifically) indicating benefit to individuals or claims relating to IHL's object and purpose as a basis for concluding that other provisions also create individual rights: see, e.g., Greenwood, *supra* note 8 at 282; Zegveld, *supra* note 1 at 504 (making this argument with respect to the treaty rules applicable in non-international armed conflict, which rarely make reference to 'rights').

[71] Hence its role in the treaty interpretation process: art 31(3)(b) VCLT.

[72] Meron, *supra* note 8 at 253-6; Greenwood, *supra* note 8 at 282-3; Aldrich, *supra* note 4 at 855-6.

the following sections focus. In this section, it will be shown that such practice throughout much of the twentieth century seemed to undermine the early support for the individual rights perspective. The following section will then explore a more recent resurgence of this idea in some State and other practice.

The concept of 'war indemnities' became well-established in the nineteenth century and generally consisted of large payments from the vanquished State to the victor without regard to war costs or legal responsibility arising from conduct.[73] The First World War triggered a change here, replacing the notion of 'war indemnity' with 'war reparations', tied more clearly to responsibility for the origins of the war and the costs incurred by the victors.[74] However, the obligation of reparations was seen to arise from the factual responsibility of the vanquished State for the overall war, rather than from legal responsibility for specific violations of IHL or other rules of public international law.[75] The concern that responsibility for violations of the law of armed conflict was frequently ignored when negotiating reparations was raised during the 1949 diplomatic conference.[76] Furthermore, these developments after the First World War did not alter the classical inter-State approach to reparations, which was often characterised by lump sum settlements with waivers of future claims of individual nationals.[77] This was confirmed after the Second World War, with a number of the peace treaties including such waivers of individual claims.[78] Though a greater effort was made to compensate particular categories of victims for their suffering,[79] there was no general individual right to reparations for violations of the laws of war.[80] Indeed, conflicts during the Cold War period rarely concluded with reparations regimes negotiated.[81] The Falklands Agreement, for example, simply renounced all State and individual claims arising from the war.[82] This practice over the twentieth century seemed to entrench the idea that war reparations remained entirely an inter-State matter, with States free to waive any

[73] Neff, *supra* note 2 at 210-14; Dolzer, 'The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons After 1945' (2002) 20 *Berkeley Journal of International Law* 296, 309-10.
[74] Treaty of Versailles (Treaty of Peace between the Allied and Associated Powers and Germany), UKTS No 4 (1919), arts 231 & 232.
[75] Borchard, 'The Opinions of the Mixed Claims Commission, United States and Germany' (1925) 19 *AJIL* 133, 134; Y Sandoz, C Swinarski, and B Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 1054; Vöneky, *supra* note 7 at 683.
[76] *Final Record: Vol II/B*, *supra* note 63 at 17 (Italy, Monaco and Spain).
[77] The mixed claims commissions established in accordance with the Versailles Treaty to hear individual (Allied nationals') claims against Germany did not alter the general rule: Dolzer, *supra* note 73 at 310 (noting that the reparations practice following the First World War 'was fully consistent' with the classical approach); Borchard, *supra* note 75 at 134; Douglas, *supra* note 25 at 163.
[78] 1947 Treaty of Peace with Italy, UKTS No 50 (1948), arts 76 and 80; 1951 San Francisco Treaty of Peace with Japan, UKTS No 33 (1952), arts 14 and 19; 1956 Joint Declaration by the Union of Soviet Socialist Republics and Japan, 263 UNTS 99, art 6. See discussion in Hofman, 'Compensation for Personal Damages Suffered During World War II' in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2013); Buxbaum, 'A Legal History of International Reparations' (2005) 23 *Berkeley Journal of International Law* 314, 331.
[79] See, e.g., 1952 Luxembourg Agreement between the State of Israel and the Federal Republic of Germany on Compensation, 162 UNTS 205, Protocol 1 (on compensation for victims of National Socialism); 1951 San Francisco Peace Treaty, *supra* note X at art 16 (reparations for Allied POWs that suffered 'undue hardship').
[80] Hofmann, 'Victims of Violations of International Humanitarian Law: Do They Have an Individual Right to Reparation against States under International Law?' in P.-M. Dupuy (ed), *Common Values in International Law: Essays in Honour of Christian Tomuschat* (2006) 348.
[81] Sullo and Wyatt, 'War Reparations' in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2015).
[82] Joint Statement by the British and Argentine Delegations, Madrid, 19 October 1989, art 3.

potential claims of their nationals relating to the war,[83] and with individuals granted compensation only to the extent that the particular States agreed.

As noted above, it was with respect to reparations (specifically compensation) for breaches of IHL where one could most clearly see support for the individual rights perspective during the drafting of Article 3 of Hague Convention IV. That initial support for an individual right to reparations under IHL seems to have been overtaken and rejected by the reparations practice above. The more recent Article 91 API, which notes the obligation of reparations for violations of the Geneva Conventions and Protocols, like Article 3 of Hague Convention IV, makes no reference to individuals having a right to invoke the responsibility of the wrongdoing State.[84] Indeed, it has been argued that the drafters of Article 91 API were more concerned with inter-State reparations, in contrast to the drafters of Article 3 of Hague Convention IV.[85] It is on this basis that Germany in its written pleadings in the *Jurisdictional Immunities* case, as well as Judges Koroma and Keith in their separate opinions, emphasised the 'long-standing' practice of settling war-related claims at the inter-State level, with no individual right to reparations for breaches of IHL.[86]

Interestingly, though the ICRC Commentaries to the Geneva Conventions explicitly took the position that the Conventions create primary, substantive rights for individuals, they also took the view that no individual right to reparations for violations of those substantive rights exists.[87] As noted, however, there is support for the view that if rights under primary rules vest in individuals, then rights under the general secondary rules on State responsibility, including the right to reparations, must also vest in those individuals in the event of a breach of the primary rules.[88] On this view, this practice rejecting any individual right to reparations could suggest a rejection of the individual rights perspective of IHL more generally.

3.3 State (and other) practice and the re-emergence of the individual rights perspective

More recently there has been a gradual re-emergence in practice of the idea expressed by the drafters of Article 3 of Hague Convention IV that the obligation to pay compensation is owed to the individual victims themselves as opposed to their State of nationality. As will be demonstrated in this section, at the heart of this trend in practice is an increasing legalisation in the approach to war reparations, with a greater focus on State responsibility for specific violations of public international law. Within this, there is greater room for individualised claims based on violations of IHL. This is in contrast to the practice referred to in the previous section, in which war reparations would rarely address violations of IHL.

An important example of this trend towards legalisation is the Eritrea-Ethiopia Claims Commission (EECC), established to hear claims of the two governments against one another and claims (albeit submitted by their governments) of individual victims against the other

[83] P. d'Argent, *Les Réparations de Guerre en Droit International Public: La Responsabilité Internationale des États á L'épreuve de la Guerre* (2002) 772 (noting that practice did not even suggest an exception for grave breaches).
[84] Art 91 API reads: 'A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation.'
[85] Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces' (1991) 40 *ICLQ* 827, 850.
[86] See *supra* at text to note 16. Similarly, see Provost, *supra* note 1 at 45; Kalshoven, *supra* note 85 at 830-7; Vöneky, *supra* note 7 at 684.
[87] See, e.g., Pictet (ed), *Commentary to Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (1958) 603 (regarding art 148 GCIV, prohibiting States from waiving State responsibility for grave breaches).
[88] See above at text to notes 22-4.

government for violations of IHL.[89] Though the majority of claims were presented as single, government claims (rather than claims on behalf of named nationals), a few of Eritrea's claims concerned harm to specific individuals for which compensation was individually assessed.[90] Moreover, unlike traditional diplomatic protection, EECC claims could be submitted on behalf of certain non-nationals with the caveat that any damages awarded were to go to those individuals.[91] These features suggest that the EECC (and the States) did in some respects consider it to be adjudicating on individual rights.[92] Similarly, the UN Compensation Commission, though generally rendering awards for losses arising from Iraqi liability under the *ius ad bellum*, did also award compensation to former prisoners of war held by Iraq that had been mistreated in violation of the Third Geneva Convention.[93] Importantly, awards of the UNCC had to go to the individual claimants.[94]

The UNCC and EECC reflect a more legalised and individualised approach to assessing reparations than the practice examined in the previous section. That said, the support they offer to an individual *right* to reparations is limited,[95] and thus they cannot be considered evidence of *opinio iuris* in support of a general, individual right to reparations for IHL violations. Other practice goes further, however, and does suggest such an individual right *de lege lata*. A number of UN resolutions, for example, provide support for this view.[96] Indeed, States endorsed this in a 2005 UN General Assembly resolution, which adopted the UN Commission on Human Rights' Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[97] Principle 11 of the Basic Principles and Guidelines states:

> Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the

[89] Algiers Agreement between Eritrea and Ethiopia, 12 December 2000, art 5(1).
[90] S.D. Murphy et al, *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission* (2013) 61.
[91] Ibid, 69-70. As a general matter, however, compensation awarded for government claims was considered the property of the governments, even if the Commission urged the governments to ensure that compensation benefited victims: EECC, Decision No 8, Relief to War Victims, 27 July 2007, [3].
[92] Schwager, *supra* note 23 at 632; D. Shelton, *Remedies in International Human Rights Law* (2nd edn, 2006) 83; Hofmann, *supra* note 80 at 352.
[93] UNCC, Governing Council, Decision 11: Eligibility for Compensation of Members of the Allied Coalition Armed Forces, UN Doc S/AC.26/1992/11. Claims could not be made by Iraqi nationals against coalition States, however, even for violations of IHL: Wooldridge and Elias, 'Humanitarian Considerations in the Work of the United Nations Compensation Commission' (2003) *IRRC* 555, 576-7 (fn 66).
[94] Gattini, 'The UN Compensation Commission: Old Rules, New Procedures on War Reparations' (2002) 13 *EJIL* 161, 170-1.
[95] See *supra* note 93 (on the UNCC's inability to assess IHL violations alleged by Iraqi nationals) and note 91 (on the view that, generally, compensation awarded by the EECC remained the property of the States). See also Algiers Agreement, *supra* note X, art 5(8) (declaring the Commission the only forum for hearing all claims and extinguishing all claims not submitted to the Commission by the deadline).
[96] See, e.g., UNSC Res. 471 (1980), [3] (calling on Israel to pay compensation to individuals harmed by Israeli violations of the Fourth Geneva Convention in the Occupied Palestinian Territories); UNSC Res. 827 (1993), [7] (referring to the right of individuals to seek compensation for violations of IHL committed in the former Yugoslavia); UNSC Res. 1304 (2000), [14] (stating, in weaker terms, that Uganda and Rwanda 'should' make reparations for loss of life and damage inflicted on the civilian population in the Democratic Republic of Congo). Cf certain resolutions of a similar age that refer to reparations as a right of the State: e.g. UNGA Res 50/22 (1996), [7] (on Lebanon's entitlement to compensation for IHL violations by Israel).
[97] UNGA Res. 60/147 (16 December 2005), Annex: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (adopted without a vote).

> following as provided for under international law: … (*b*) Adequate, effective and prompt reparation for harm suffered …[98]

Similarly, though not *State* practice, the International Law Association's 2010 Declaration on International Law Principles on Reparation for Victims of Armed Conflict states, in Article 6, that '[v]ictims [whether natural or legal persons] of armed conflict have a right to reparation from the responsible parties'.[99] Indeed, this view also finds some support in the practice of international judicial and fact-finding bodies. In its *Israeli Wall* advisory opinion, for example, the ICJ drew on general principles of law to conclude that Israel is obligated to make reparations *to natural and legal persons* harmed by its construction of the wall, which it had earlier found to be in violation of IHL and IHRL.[100] Similarly, UN Commissions of Inquiry, an increasingly common tool to address mass violations, have endorsed the notion that violations of IHL entail a State's responsibility to make reparations directly to individual victims.[101]

There is some further evidence of *opinio iuris* in support of an individual right to reparations under IHL in domestic jurisprudence. From the 1990s onwards, there has been a notable increase in cases brought by individuals before domestic courts seeking compensation for violations of IHL.[102] One must exercise caution in inferring from these cases the courts' views on individual rights under IHL. Claims may succeed for reasons other than an international humanitarian law right, such as a domestic statute or a human rights treaty. Similarly, claims may not succeed without any rejection of the principle that individuals have such a right under IHL; for example, they may fail on the basis of State immunity or domestic constitutional law rules such as the political question doctrine or the non-self-executing nature of any purported right under IHL.[103]

In certain of these cases, however, the views of the courts on the question of an individual right to reparations under IHL are made clear. Within this category are a few cases that provide some support for the view that such a right exists, including Greek jurisprudence in the cases that in part prompted the ICJ's *Jurisdictional Immunities* case.[104] These concerned individual claims against

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[98] The Basic Principles and Guidelines suggest that the Commission sought to codify existing law: UNGA Res 60/147, Annex, preambular [7].

[99] ILA, Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues), Res. 2/2010 (2010). The Commentary makes clear that the Declaration is codifying what it considers to be an existing right under IHL: ibid, Commentary to art 6, [2(n)].

[100] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion [2004] ICJ Rep 136, [152]-[153].

[101] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, [593]-[600] (explicitly recognizing that an individual right to reparations has developed in IHL in light of the influence of IHRL); Human Rights Council (HRC), 3rd Report of Independent International Commission of Inquiry on Syria, A/HRC/21/50, 16 August 2012, [21]; HRC, Report of the Office of the High Commissioner for Human Rights Investigation on Sri Lanka, A/HRC/30/CRP.2, 16 September 2016, [1260]; HRC, Report of the UN Fact-Finding Commission on the Gaza Conflict, A/HRC/12/48, 25 September 2009, [1864] and [1868]; HRC, Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1 (Gaza), A/HRC/29/CRP.4, 24 June 2015, [46] (referring to the UNGA Basic Principles and Guidelines as enjoying 'far-reaching support'); HRC, Report of the Commission of Inquiry on Lebanon, A/HRC/3/2, 23 November 2006, 8 (noting the absence of mechanisms at the international level to hear individual claims for IHL violations, whilst nonetheless appearing to recognise individual rights to invoke State responsibility).

[102] Dolzer, *supra* note 80 at 297.

[103] Gattini, 'To What Extent are State Immunity and Non-Justiciability Major Hurdles to Individuals' Claims for War Damages?' (2003) 1 *Journal of International Criminal Justice (JICJ)* 348..

[104] The Italian cases that were the subject-matter of the dispute in the *Jurisdictional Immunities* case did not explicitly address this question: *Ferrini v Federal Republic of Germany,* Decision No 5044/2004, Italian Court of Cassation (Plenary Session), 11 March 2004.

Germany for the June 1944 killing of civilians and destruction of property in violation of IHL by German occupation forces in the Greek village of Distomo. The Greek court at first instance accepted individual claims for compensation under Article 3 of Hague Convention IV for violations of the Hague Regulations by German forces.[105] Further support for an individual right to reparations under IHL is found in Dutch case law concerning alleged violations of API committed during the 1999 NATO campaign against the Federal Republic of Yugoslavia.[106] Though rejecting the claims on the merits, the Dutch courts did not seem to challenge the assumption that individual victims of violations of API may bring a claim for compensation against the responsible State.[107]

Notwithstanding this Greek and Dutch jurisprudence, courts of certain other jurisdictions have resolutely rejected the claim that individuals have a right to reparations for IHL violations. A number of cases have been brought against Japan since the 1990s, for example, by victims of, inter alia, the Japanese practice exploiting so-called 'comfort women', mistreatment during detention, and forced labour imposed on Chinese and Korean civilians.[108] The tendency of Japanese courts has been to reject these cases on the basis that IHL (including Article 3 of Hague Convention IV and custom) does not grant individuals a right to reparations.[109] German courts have similarly rejected individual claims for compensation for IHL violations on the explicit basis that IHL does not provide an individual right to compensation for breaches of its primary rules, instead leaving it to the discretion of the national State whether or not to exercise diplomatic protection. This approach has been taken in a range of cases, including claims relating to the Distomo massacre,[110] Germany's participation in the 1999 NATO campaign against the FRY,[111]

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[105] *Prefecture of Voiotia v Federal Republic of Germany,* Case No. 137/1997, Court of First Instance of Leivadia, Greece, October 30, 1997.

[106] *L Dedovic et al v W Kok et al*, Court of Appeal of Amsterdam (Gerechtshof te Amsterdan), 6 July 2000 (2004) 35 NYIL 508, 521-2.

[107] Ibid. See also *Danikovic et al v State of Netherlands*, Supreme Court, 29 November 2002 (2004) 35 NYIL 522 (rejecting a claim from FRY soldiers against the Netherlands that sought compensation, inter alia, for violations of API on the ground that the soldiers themselves did not have an interest in such a claim as they were not the victims of any alleged violation).

[108] Bong, 'Compensation for Victims of Wartime Atrocities: Recent Developments in Japan's Case Law' (2005) 3 *JICJ* 187, 187-8.

[109] See, e.g., *X et al v State of Japan*, Tokyo District Court, Judgment, 30 November 1998 (1999) 42 *Japanese Annual of International Law (JAIL)* 143 (finding no *individual* right of reparations under art 3 of Hague Convention IV or custom, instead seeing it as a right of the national State); *Maria Rosa Henson* et al *v State of Japan*, Tokyo District Court, Judgment, 9 October 1998 (1999) 42 *JAIL* 170 (after examining State practice, finding no change to the inter-State character of IHL); *X* et al *v State of Japan,* Tokyo High Court, Judgment, 7 August 1996 (1997) 40 *JAIL* 116 (rejecting the claim that custom grants an individual right to compensation, though interestingly altering the lower court's judgment to the effect that custom *at the time of the violation* did not grant such a right); *X v Y*, Supreme Court, Judgment, 27 April 2007 (2008) 51 *JAIL* 518 (holding that individual claims by Chinese prisoners for forced labour during the Second World War had been waived by the 1972 Chinese-Japanese Joint Communique); *Shimoda* et al *v State of Japan*, Tokyo District Court, Judgment, 7 December 1963 (1964) 8 *JAIL* 212 (holding that individual domestic law claims against Japan concerning the Hiroshima and Nagasaki bombings were waived by the San Francisco Peace Treaty).

[110] *Greek Citizens v. Federal Republic of Germany*, Case No III ZR 245/98, 23 June 2003, Federal Supreme Court (BGH) 42 ILM 1027 (2003); *Greek Citizens v. Federal Republic of Germany*, Case No 2 BvR 1476/03, Federal Constitutional Court (BVerfG) (Second Chamber, First Section).

[111] *Varvarin Bridge Case (36 Citizens of Yugoslavia v Germany)*, 2 BvR 2660/06, 2 BvR 487/07, ILDC 2238 (DE 2013), EuGRZ 2013, 563, DÖV 2013, 946, 13th August 2013 (Constitutional Court [BVerfG]) (though noting recent practice in favour of individual rights under IHL, the Court concluded that the orthodox inter-State approach to reparations remains the positive law). See discussion in Mehring, 'The Judgment of the German *Bundesverfassungsgericht* concerning Reparations for the Victims of the Varvarin Bombing' (2015) 15 *International Criminal Law Review* 191.

and civilian deaths resulting from the 2009 Kunduz airstrike ordered by a German officer.[112] Finally, US courts too rejected such claims, again on the grounds that, in their view, IHL does not provide an individual right to reparations. This view has been expressed in relation to claims by Panamanian companies for failure of the US government to prevent looting of their property following the US invasion and occupation,[113] claims against Germany for slave labour and mistreatment in Nazi concentration camps,[114] and claims against Libya, the Palestine Liberation Organisation (PLO) and the Palestine Information Office in relation to a terrorist attack by the PLO in Israel.[115]

US, German and Japanese jurisprudence thus remain firmly of the traditional view that the holders of the right to reparations for IHL violations are not individual victims but their national States. Yet the Greek and Dutch cases, like the other practice referred to in this section, appear to depart from this traditional approach and present a different view of the law. Scholarship is similarly divided on this point.[116]

Though the principal purpose of the preceding sections has not been to make definitive conclusions as to the existence of an individual right to reparations under IHL *de lege lata*, given this divergence in views, a few tentative proposals will be offered on this before concluding with some themes that can be drawn out of the above analysis. Arguably practice and scholarly opinion are sufficiently divided such that one cannot easily resolve whether IHL does grant an individual right to reparations. What is clear, however, is that, notwithstanding earlier practice to the contrary, there is now growing support for a specific individual right to reparations for IHL violations. This growing support has been recognised by the ICRC, for example, which has replaced its earlier rejection of an individual right to reparations with a more tentative acknowledgment of practice supporting such a right.[117]

This individual right to reparations thus appears to be crystallising, and it is submitted that both the early support of such a right in the *travaux* of Hague Convention IV, as well as this more recent supporting practice, gives a strong basis for courts and other bodies to assert such a right. Moreover, this should be seen as a general right in response to a violation of any IHL provision that protects the interests of individual victims and not only those that confer direct substantive rights.[118] This would then have the advantage of not having to determine the existence or

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[112] *Kunduz* case, 11 December 2013, Regional Court of Bonn, LG Bonn - 1 O 334/10, 1 O 460/11, 1 O 334/10, 1 O 460/11; *Kunduz* case, Federal Court of Justice, 6 October 2016, III ZR 140/15. See discussion in Henn, 'The Development of German Jurisprudence on Individual Compensation for Victims of Armed Conflict' (2014) 12 *JICJ* 615.

[113] *Goldstar and ors v United States*, 967 F 2d 965 (4th Cir 1992).

[114] *Princz v Germany*, Appeal Judgment, 26 F3d 1166 (DC Cir 1994).

[115] *Tel-Oren v Libyan Arab Jamahiriya and ors*, Appeal Judgment, Per Curiam, 726 F.2d 774 (D.C. Cir. 1984).

[116] Recognising an individual right to reparation, see, e.g. Mazzeschi, 'Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview' (2003) 1 *JICJ* 339; Zegveld, *supra* note 1; Sassòli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 *IRRC* 401; Bank and Schwager, *supra* note 1. Rejecting this view, see, e.g., Tomuschat, *supra* note 1; Fleck, 'Individual and State Responsibility for Violations of the Ius in Bello – An Imperfect Balance' in W. Heintschel von Heinegg and V. Epping (eds), *International Humanitarian Law Facing New Challenges* (2007) 190-3; d'Argent, *supra* note 83 at 784-91.

[117] Sandoz et al, *supra* note 75 at 1056-7; J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (2005) 541; ICRC, *supra* note 59, Commentary to art 51 GCI, [3025].

[118] See, e.g., the UN Basic Principles and Guidelines and the ILA Declaration, which do not limit the right to reparations to violations of particular rules: *supra* notes 97 and 99. A comprehensive examination of this question *de lege lata* would, therefore, need to consider a number of questions in more detail, including precisely when an individual is considered a 'victim' of a violation of IHL, which may be affected by considerations such as the primary rule violated and the seriousness of the violation.

otherwise of individual substantive rights in order to answer the question *de lege lata* of whether individuals have a right to reparations for violations of those substantive rules.[119] Importantly, this right to reparations need not be seen as absolute; rather, as noted, such a right could operate so as to exclude complete waiver by States without any form of reparations, but be limited by the ability of States to negotiate mass reparations (which need not be compensation[120]) with a mechanism for ensuring that any such solution benefit the individual victims.[121] This view of an individual, yet limited, right would help to address those concerns over the practicability of individualised approaches to mass reparations whilst contributing to the fight against impunity.[122]

Finally, a few words should also be said about reparations in the context of non-international armed conflicts, as most of the practice referred to above relates to reparations in international armed conflicts. Indeed, Article 3 of Hague Convention IV and Article 91 API apply *qua* treaty only in international conflicts. However, it is clear that the obligation to make reparations also applies in non-international conflicts.[123] Indeed, in the absence of a specific treaty provision, we simply fall back on the general principle set out in *Chorzow Factory*.[124] The next question, of course, is to whom such an obligation is owed. There is strong evidence here also that the obligation to make reparations in non-international armed conflicts is owed to individual victims themselves. First, there is practice and *opinio iuris* supporting this view. For example, the Basic Principles and Guidelines, adopted by the General Assembly, and the ILA's 2010 Declaration both consider individual victims as the holders of the right to reparations for violations of IHL, whether in international or non-international conflicts.[125] Furthermore, UN Commissions of Inquiry have affirmed an individual right to reparations for IHL violations in the context of non-international armed conflicts.[126] A number of UN resolutions also give some support for the individual right to reparations in non-international conflicts (though the precise source of any suggested right is often not made explicit).[127] There is also much domestic practice, albeit not supported by *opinio iuris*, in which reparations programmes are established in the aftermath of non-international armed conflicts as part of transitional justice arrangements.[128]

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[119] Cf Peters, *supra* note 1 at 212 (arguing that a secondary right should only exist if there is a primary right).

[120] Article 3 of Hague Convention IV and Article 91 API require compensation 'if the case demands'. Gillard, 'Reparations for Violations of International Humanitarian Law' (2003) 85 *IRRC* 529, 533 (noting other forms of reparations). This approach is taken, e.g., in Art 18 of the UN Basic Principles and Guidelines.

[121] See *supra* at text to notes 35-6.

[122] See, e.g., Gattini, *supra* note 103 at 364-5; Tomuschat, *supra* note 23 at 18-25; *Jurisdictional Immunities* (Germany), *supra* note 23 at [46]; *Tel-Oren, supra* note 115 at 120.

[123] Henckaerts and Doswald-Beck, *supra* note 117, Rule 150.

[124] *Chorzow Factory*, *supra* note 22.

[125] UNGA, *supra* note 97 at Annex, para 15; ILA Principles, *supra* note 99 at art 6.

[126] See *supra* note 101 (reports on Sri Lanka, Syria, Darfur).

[127] UNGA Res 48/147 (1994) [10] (calling on Sudan to compensate families of killed individuals working for foreign relief organisations); UNGA Res. 51/108 (1996) [11] (calling for remedies for victims of IHL and IHRL violations in Afghanistan); UNGA Res 68/165 (2014), preambular [13] (emphasizing the importance of access of victims to effective remedies for violations of IHL generally); UNGA Res 68/182 (2013) [11] (emphasizing the importance in Syria of domestic processes for reparations and effective remedies for victims); UNSC Res 1894 (2009), preambular [14] (recognizing the importance of reparation programmes for violations of IHL generally); UNSC Res 2296 (2016) [9] (expressing concern with delays in compensation in the context of the South Sudan conflict); UN Commission on Human Rights, Res. 1995/77, E/CN.4/1995/176, [15]-[17] (calling on parties to the Sudan conflict to comply with IHL and provide compensation to victims).

[128] See, e.g., McCormack (ed), 'Correspondents' Reports' (2008) 11 *YIHL* 407, 537 (Peruvian legislation providing reparations to victims of serious violations of IHL during non-international conflict there); Lesh (ed), 'Correspondents' Reports' (2007) 10 *YIHL* 279, 405-6 (Philippines bill on compensation for non-combatants harmed or who suffered loss during military operations). See case studies in C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (2012).

Secondly, given that non-international armed conflicts are not inter-State in nature, legal logic points to the conclusion that reparations should be seen as being owed directly to individual victims. One might take a few different views on this, but none seems conceptually as reasonable as an individual rights perspective. For example, it might be argued that the law of non-international armed conflict, though speaking to the relationship between States and non-State groups, in fact remains legally inter-State, with the rights created thereunder vesting only in other States that have contracted to observe these rules in non-international conflicts. Indeed, as noted above, the text of those provisions specifically designed for non-international armed conflicts does not use the language of individual 'rights'. However, a right to compensation (as a specific form of reparations) for violations of rules of this nature would not ordinarily vest in non-injured States, but could only be claimed thereby in the interest of injured States (of which there would be none where the victims are nationals of the violating State) or the beneficiaries of the obligation breached (i.e. individual victims).[129] It would thus seem more reasonable to conclude that victims of IHL violations in non-international armed conflicts have a right to reparations for violations of IHL.[130]

3.3 Concluding remarks on individual rights under IHL

The above sections have explored the development in IHL's recent history of the notion of individual rights under IHL. The principal goal in doing so has been to explore how this debate has evolved over time and, in particular, to test the claims made in the *Jurisdictional Immunities* case concerning this question. In so doing, two important points may be drawn out of the above discussion. The first concerns the orthodox legal position. It was shown that those rejecting the individual rights perspective in the *Jurisdictional Immunities* case relied in part on strong historical claims that States have never accepted such a view of IHL. This, however, was shown in section 3.1 to be inaccurate, with the drafters of both early and contemporary IHL treaties accepting the notion of individual rights. It was, however, State practice in the context of war reparations during much of the twentieth century that overtook this, treating States and not individuals as the key rights-holders under IHL.

The second point to draw out of the above discussion is the recent re-emergence of the individual rights perspective and the trends of humanisation and legalisation that influenced this. Humanisation of the law and the influence of IHRL were alluded to previously and is often invoked as the driver behind the evolution of individual rights under IHL, including the right to reparations.[131] Less acknowledged, however, yet no less important, is the role of the legalisation of war reparations. The tendency simply to hold the vanquished State responsible for the fact of the entire war and thus for all victor State losses incurred, is increasingly being replaced with processes in which legal responsibility is invoked specifically for IHL violations. The EECC, UNCC and UN Commissions of Inquiry were noted above in this regard, and ICJ jurisprudence

[129] ILC, Articles on State Responsibility, *supra* note 22, art 48(2)(b); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16, [127].

[130] A comprehensive examination of this issue *de lege lata* would need to consider the opposability of such a right to non-State armed groups responsible for IHL violations: on this, see ILC, Articles on State Responsibility, *supra* note 22, Commentary to Art 10, [16]; Henckaerts and Doswald-Beck, *supra* note 117 at 549-50.

[131] Meron, *supra* note 1; Zegveld, *supra* note 1 at 505; Schwager and Bank, *supra* note 1 at 389-90; *Jurisdictional Immunities of the State* (Greece), *supra* note 11 at [31]-[33]; *Jurisdictional Immunities of the State* (Judge Cancado Trindade), *supra* note 12 at [70]; Report of the International Commission of Inquiry on Darfur, *supra* note 101 at [593]-[600].

in which it is called on to assess actions in armed conflict can also be seen as an example of this trend toward legalisation.[132] As responsibility is invoked specifically for IHL violations, it becomes easier to view the obligation to make reparations as owed directly to individual victims.

To say that IHL creates rights directly for individuals is to view it as serving the oal of protecting and empowering individuals. As explained, those in the *Jurisdictional Immunities* case that made this argument did so by reference to their view of IHL's object and purpose.[133] Yet the very different notion of *State rights* under IHL has recently re-emerged in certain practice, presenting a rather different view of the role of law in armed conflict. In this practice, we see IHL not as empowering individual victims, but rather empowering States to broaden their discretion in how they conduct military operations. It is to this that we now turn in the final section.

4 State rights under IHL: a different vision for the law?

At the outset of this article, it was noted that the notion of 'rights' under IHL was historically seen in very different terms to that explored thus far, predominantly as *State* or *belligerent* rights, that is, rights granted to States and belligerents that permit actions which would not be permitted in peacetime. We have seen this notion of rights under IHL emerging again, most recently in litigation relating to detention during armed conflict. In the case of *Serdar Mohammed v Secretary of State for Defence*, the UK government sought to modify (weaken) its obligations under Article 5 ECHR (comprising rights of detainees) by arguing that IHL grants a legal basis to detain certain civilians during a non-international armed conflict; at first instance and on appeal the courts rejected this argument, instead holding that Article 5 ECHR applies as usual to such detentions.[134] This case is, of course, closely related to the line of practice on the relationship between IHL and IHRL, in which the former has been invoked by States in a permissive sense so as to broaden the powers available to States under the latter.[135] Notions of a 'global battlefield', governed by IHL and with boundaries coterminous with the State's military operations against broad categories of non-State actors, represent the evolution of these claims.[136]

I have engaged with these arguments in detail elsewhere, and I do not wish to repeat that here.[137] Instead, this practice is referred to in order to juxtapose the notion of *State* rights under IHL invoked by the UK and other governments with the notion of *individual* rights that was explored above and was invoked by Greece and Italy in the *Jurisdictional Immunities* case. There is nothing

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[132] See, e.g., *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)*, Judgment [2005] ICJ Rep 168, [259]-[261] (referring to the obligation to make reparations for specific violations, including of IHL, which are to be negotiated); *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)*, Order of 1 July 2015 [2015] ICJ Rep 580 (on the new request for a reparations judgment in light of a failure to negotiate).

[133] See above at text to notes 37-8.

[134] *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB); *Serdar Mohammed et al v Secretary of State for Defence; Yanus Rahmatullah and the Iraqi Civilian Claimants v Ministry of Defence and Foreign and Commonwealth Office* [2015] EWCA Civ 843; *Al-Waheed and Mohammed v Ministry of Defence* [2017] UKSC 2.

[135] See, e.g., *Hassan v UK, supra* note 21; *Case of Rodríguez Vera* et al *(The Disappeared from the Palace of Justice) v Colombia*, Inter-American Court of Human Rights' Judgment (Series C) No 287 (2014) [38].

[136] See discussion in Lubell and Derejko, 'A Global Battlefield?: Drones and the Geographical Scope of Armed Conflict' (2013) 11 *JICJ* 65; Blank, 'Defining the Battlefield in Contemporary Conflict and Counterrorism: Understanding the Parameters of the Zone of Combat' (2010) 39 *Georgia Journal of International & Comparative Law* 1.

[137] L. Hill-Cawthorne, *Detention in Non-International Armed Conflict* (OUP, Oxford 2016) especially 66-76 (on *Serdar Mohammed*) and chs 5 and 6 (on the relationship between IHL and IHRL).

mutually exclusive between these different claims in themselves; the law can create rights for individuals in some respects and rights for States in others. Indeed, one must not lose sight of the differing contexts of these claims: for the UK, the notion of State rights under IHL was central to its defence against the charge of unlawful detentions; for Greece and Italy, the notion of individual rights was part of their defence against the alleged wrongdoing of their courts. Not only the actor but also the context is thus important in determining the content of legal arguments, including the way in which 'rights' under IHL are invoked in any given circumstance.[138] Similarly, IHL's inherent compromise between humanitarian considerations and military necessity certainly invites interpretive disagreement resulting from differing weight being placed on each of these underlying concerns.

Yet, while these two uses of 'rights' in IHL may not be incompatible as such, it is submitted that the tension emerges in the different understandings of IHL's purpose that underlies each, or, to put it another way, what these claims mean for the role that law is to serve in contemporary armed conflict. In *Serdar Mohammed*, IHL was invoked for quite a different purpose than it was in the *Jurisdictional Immunities* case, not as a protective legal regime that empowers individuals to assert and enforce their own rights, but rather as a permissive regime empowering States to take measures that would not otherwise be lawful. Indeed, this contemporary resurgence in the notion of State rights seems to challenge the view presented above of IHL as an increasingly humanised and individual-focused body of law. The different ways in which the notion of 'rights' is invoked in these claims thus have important implications for, and present radically different views of, the law's *raison d'etre*, i.e. the purpose that IHL is to serve in armed conflict. This is clear when comparing the reliance on IHL by the UK in *Serdar Mohammed* as a source of State rights to detain with Italy's assertion in the *Jurisdictional Immunities* case that 'IHL does not pose rights and obligations in the interests of the Contracting Parties, but to protect persons … This is more than a fundamental principle of IHL, it is its very raison d'être'.[139] This disagreement over IHL's underlying purpose is increasingly apparent in scholarship, with some seeing IHL in a purely prohibitive sense and others seeing it in a permissive sense.[140]

Different interpretations, and even different views of the primary purpose of a particular rule, is an inevitable feature of law. As noted, this tension is clearly related to IHL's inherent compromise between humanitarianism and military necessity, which already gives us notice of the opposing forces that inform IHL. Yet the incompatible visions presented by the protective, individual-empowering view and the permissive, State-empowering view risks creating an identity crisis for IHL. Indeed, if scholars disagree over whether IHL is purely prohibitive or (also) permissive, meaningful debate becomes impossible.

To understand how such fundamental disagreement is possible in IHL, an appreciation of the historical influences on the contemporary law of armed conflict is necessary. Stephen Neff's account of the history of the relationship between law and war is useful here. According to his account, the contemporary law of armed conflict has two key, seemingly conflicting, influences.[141] On the one hand, Neff argues that the end of the Second World War and the

[138] For an interesting discussion of related points, see Windsor, 'Narrative Kill or Capture? Unreliable Narration in International Law' (2015) 28 *Leiden Journal of International Law* 743.
[139] See *supra* at note 38.
[140] Compare, e.g., Jinks, 'International Human Rights Law in Times of Armed Conflict' in A. Clapham and P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (2014) 666–9 (IHL as purely prohibitive) and Aughey and Sari, 'Targeting and Detention in Non- International Armed Conflict: *Serdar Mohammed* and the Limits of Human Rights Convergence' (2015) 91 *International Law Studies* 60 (IHL as also permissive).
[141] Neff, *supra* note 2 at 396.

prohibition of the use of force in the UN Charter led to a 'humanitarian revolution' in IHL, with its principal goal being seen as relieving 'the sufferings of victims of war' and viewing the law 'in terms of restraint rather than privilege. This was in sharp contrast to the prevailing view of the previous centuries, where there had been concern with the *rights* of belligerents'.[142] This helps to explain the trend of humanisation discussed above and, with it, individual rights-based accounts of IHL. Yet, against this, Neff also notes that contemporary IHL has been heavily influenced by the nineteenth century notion of war as a legal institution, in which war was treated as legal situation regulated exclusively by a specific set of rules.[143] This idea makes the re-emergence of the idea of State rights and IHL as a permissive body of law more understandable. Indeed, scholars such as Nathaniel Berman and David Kennedy view this as a principal force on IHL today, accounting for the evolution of IHL as a process whereby law and war have become ever more inter-connected.[144] Berman and Kennedy argue that this inter-connectedness enables the strategic instrumentalisation of contemporary IHL by States and military actors:

> Consequently, to resist war in the name of law, to exalt law as an external ethical restraint on the frequency and violence of war, to praise law for bringing the calculations of cool reason to the passions of warfare is to misunderstand the delicate partnership of war and law … Although legal and military professionals may seem to march to different drummers, law no longer stands outside violence, silent or prohibitive. Law also permits injury as it privileges, channels, structures, legitimates and facilitates acts of war.[145]

The manner in which IHL was invoked by the UK in *Serdar Mohammed*, for example, and the traditional concept of belligerent rights, seems to fit this narrative well; if the law is seen not as an external force limiting war but an internal vocabulary and strategic consideration, it becomes much easier to understand how the UK could rely on it as an explicitly permissive set of rules.

These accounts go some way in explaining how it is that the incompatible visions of IHL's object and purpose that are supported by these different notions of 'rights' can co-exist. To be sure, the suggestion is not being made that we should (or indeed could) attempt to reconcile these different visions. Yet it is suggested that a greater appreciation of the implications of particular legal arguments for the overall aims and trajectory of the law is essential if IHL is to avoid an identity crisis. Moreover, a greater awareness of our own perspectives on IHL's overall purpose is needed if we are to have meaningful debates about the law. By doing this, one can start to engage with the question of the role that the law should serve in regulating armed conflict.

5 Concluding remarks

The article has examined the notion of 'rights' under international humanitarian law. In so doing, its aims were two-fold. The largest part of the article explored the development of the idea of individual rights in IHL's history in order to test the various claims made in the *Jurisdictional Immunities* case. That exploration revealed a more nuanced account of the emergence of individual rights across the contemporary history of IHL, not as a linear progression but rather

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[142] *Ibid,* 340.
[143] Ibid.
[144] D. Kennedy, *Of War and Law* (2006); Berman, 'Privileging Combat: Contemporary Conflict and the Legal Construction of War' (2004) 43 *Columbia Journal of Transnational Law* 1.
[145] Kennedy, *ibid*, 167.

fluctuating over time. Thus, early support for the individual rights perspective was superseded by practice relating to war reparations over much of the twentieth century, only to re-emerge again in recent practice that, in part, reflects a more legalised (and individualised) approach to reparations for violations of IHL. The inclusion in the Rome Statute of the International Criminal Court of the power to award reparations to victims of IHL violations is indicative of this more individualised approach.[146]

The second aim of the article was to compare the debate over individual rights with the re-emergence of the concept of belligerent or State rights under IHL. This was the subject of section 4, and it was argued there that these different notions of 'rights' under IHL and the different ways in which the law is invoked under each are not merely subtle interpretive differences but reflect more fundamental disagreements over the purpose that we wish law to serve in armed conflict.

How the law will develop with respect to these two notions of 'rights' remains to be seen. The development of IHL is influenced by a wide range of different actors, States and non-State, and claims made in its name are constantly assessed and reassessed against this diverse background.[147] It is essential, however, for those making such claims to be aware of their implications for braoder questions concerning the *raison d'être* of IHL.

[146] Article 75 of the 1998 Rome Statute of the International Criminal Court.
[147] Alexander, 'A Short History of International Humanitarian Law' (2015) 26 *EJIL* 109.